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Supreme Court of the United States

OCTOBER TERM, 1937

No. [redacted] 55

A. E. McDONALD, *Petitioner*

vs.

ERNEST O. THOMPSON, ET AL.

Petition For Rehearing
and
Brief in Support of Motion For Rehearing

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Supreme Court of the United States

OCTOBER TERM, 1937

No. 1052

A. E. McDONALD, *Petitioner*

vs.

ERNEST O. THOMPSON, ET AL.

Petition For Rehearing

To The Honorable The Supreme Court:

NOW COMES the petitioner, A. E. McDonald, and earnestly submits his motion for a rehearing in a sincere and honest challenge of the manifest error of this Court's opinion and judgment, briefly states the position of petitioner, and for specification of such error says:

This Court's holding that petitioner was operating in violation of Texas law on June 1, 1935, and therefore was not a bona fide operator and not within the proviso of Sec. 206, Motor Carrier Act, 1935, is manifestly erroneous for two distinct reasons:

(a) The question of petitioner's bona fide operation is not before this Court for the reason that that exact question of fact is now pending before the Interstate Commerce Commission and undetermined,

and this Court under its own decisions overreached its jurisdiction in determining that question; and,

(b) If the question of bona fide operation is before this Court then its holding that petitioner was violating a Texas Statute is obviously erroneous and contrary to *Railroad Commission v. Bates*, 108 S. W. (2d) 286, and other cases cited.

If McDonald has violated any Texas statute and is guilty of crime, *then what statute?* This Court quite casually convicts him as a law violator. *What law has he violated?*

This Court's opinion completely writes out of the Federal Act the language "*and if such carrier was registered on June* 1, 1935, *under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate.*" Isn't it fair and reasonable to assume that if Congress had intended to make compliance with some supposed state law a prerequisite to bona fide operation that it would have used appropriate language to that effect rather than referring to registration under a code of fair competition?

This Court writes out of the Act the language of Congress and engrafts a condition of its own making.

This Court writes out of the statute the plain, unambiguous language of Congress that "*if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect,*" that "*Pending the determination of any*

such application the continuance of such operation shall be lawful," and substantially substitutes a provision of its own choosing (contrary to the act of Congress) to this effect *"If applicant file an application with the Commission within one hundred and twenty days and shows compliance with state statutes, whether such statutes infringe the Commerce Clause of the Federal Constitution or not, pending the determination of any such application the continuance of such operation shall be lawful."*

That is not what Congress, which was familiar with state laws, provided and is it not fair and reasonable to assume that had Congress intended to make compliance with any supposed state law a condition requisite that it would have here made reference to such state laws as it did do in at least two other instances in the Motor Carrier Act, 1935, but here wholly failed to do.

Under any rule of statutory construction the naming of "registration under any code of fair competition," excluded the idea of compliance with some supposed state law.

Under every rule of statutory construction a court must endeavor to give effect to every word, phrase, clause, and sentence of an Act. A court is not authorized to write language of an Act entirely out where constitutional effect may be given to it as is quite simple here. Neither is a court justified nor may it, substitute its own judgment for the conditions and provisions of a statute for that of the Congress.

Please do not convict a good citizen of Texas of "defiance of its laws" and sentence him to bankruptcy without answering the questions.

(a) If McDonald defied or violated any law of Texas, *then what law?*

(b) If the State of Texas can pass a law requiring "certificates of convenience and necessity" or other form of "permit" of an exclusive interstate operator, *has it done so?*

(c) If the question of bona fide operation is before the Court, *how did it get there?* Especially when the *original exclusive jurisdiction is given to the Interstate Commerce Commission,* where the application is now pending, *both under the statute and your own decisions.*

May we earnestly discuss the obvious errors assigned under the following specific grounds or propositions of error.

GROUND NO. I

The question of "bona fide operation" is distinctly one of fact. The original exclusive jurisdiction to determine such fact question is committed to the Interstate Commerce Commission under the Motor Carrier Act, 1935. Obviously it is error for this Honorable Court to assume original jurisdiction to determine this issue contrary to the statute and deprive the Interstate Commerce Commission of its original statutory jurisdiction and this petitioner the right of obtaining a finding and adjudication by the body of original

jurisdiction. Briefly stated, this Honorable Court has overreached its original jurisdiction.

AUTHORITIES

Great Northern Ry. Co. v. Merchant's Elevator Co., 259 U. S. 285, 42 Sup. Ct. 477.

Abilene Cotton Oil Co. v. T. & P. Ry. Co., 204 U. S. 426, 27 Sup. Ct. 350.

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Dayton Goose Creek R. R. Co. v. U. S., 263 U. S. 456, 44 Sup. Ct. 169.

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United States v. Illinois Central R. Co., 291 U. S. 457, 54 Sup. Ct. 471.

Atlantic Coast Line Ry. Co. v. Hampton, 80 Fed. Supp. 797.

GROUND NO. II

The Supreme Court of Texas, followed by the Court of Civil Appeals of Texas, having construed the Texas statute and held that operators similarly situated to petitioner were in "bona fide" operation and entitled to continue to operate until the Interstate Commerce Commission should otherwise order, in spite of the Texas statutes, and having refused to hold that such an operator as petitioner was operating in "defiance" of Texas law is necessarily binding upon the Federal Courts.

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Coombes v. Getz, 285 U. S. 434, 52 Sup. Ct. 435.
Price v. Illinois, 238 U. S. 446, 35 Sup. Ct. 892.
Sage v. Baldwin, 55 Fed. (2d) 968.

GROUND NO. III

The Texas truck law does not now, and has never required, that petitioner have a so-called State Interstate Certificate of Convenience and Necessity, nor any other kind of permit, and any such construction makes the Texas statute unconstitutional. Petitioner has not therefore operated in "defiance of any law of this State."

AUTHORITIES

State v. Sugarland Ry. Co., 163 S. W. 1047.
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State v. Jack, 69 Kansas 387, 76 Pacific 911, 1 L. R. A. (N. S.) 167, affirmed 199 U. S. 372, 26 Sup. Ct. 73.

Williams v. Standard Oil Co., 278 U. S. 235, 49 Sup. Ct. 115, 60 A. L. R. 596.

We beseech of each member of this Court a careful reading of our supporting brief under each ground of error.

WHEREFORE, your petitioner respectfully prays that this motion for rehearing be granted and that upon reconsideration of this cause that the judgment of the Circuit Court of Appeals be overruled and that the judgment of the trial court herein be in all things affirmed.

Respectfully submitted,

T. S. CHRISTOPHER,
Counsel for Petitioner.

PRICE AND CHRISTOPHER,
LLOYD E. PRICE,
Of Counsel.

I, T. S. Christopher, in compliance with Rule 30 of the Supreme Court, do hereby certify that the foregoing petition for rehearing was filed in good faith and not for delay, and in an earnest belief that the court has erroneously determined this cause requiring further consideration.

T. S. CHRISTOPHER,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1937

No. 1052

A. E. McDONALD, *Petitioner*

vs.

ERNEST O. THOMPSON, ET AL.

Brief in Support of Motion For Rehearing

To the Honorable The Supreme Court:

Now comes the petitioner, A. E. McDonald, and earnestly submits this brief on petition for a rehearing in a sincere, honest challenge of the manifest error of this Court's opinion and judgment, earnestly hopeful that this Court shall give its ear and attention:

PRELIMINARY STATEMENT

This Court in holding that McDonald was operating in violation of Texas law in June, 1935, and was therefore not a bona fide operator within the proviso of the Federal Act of 1935 is wrong for three distinct reasons:

(a) The holding that McDonald was violating a Texas statute is exactly contrary to the following Texas decisions which have interpreted the Texas

statutes: *Sage v. Baldwin*, 55 Fed. (2d) 968; *Railroad Commission v. Bates*, 108 S. W. (2d) 286; and *Southwestern Greyhound Lines, Inc., v. Railroad Commission of Texas*, Supreme Court of Texas, 99 S. W. (2d) 268. The Bates case and other Texas decisions like it hold squarely that persons in exactly the same status as McDonald, who were operating without a state certificate on June 1, 1935, were not only not violating a law but were entitled to permanent injunctions against respondents restraining interference with their purely interstate business. Such Texas decisions construing Texas law should be binding on this Court.

(b) The question of McDonald's bona fide operation is not before this Court in this case for the reason that such exact question is now pending and undetermined in the Interstate Commerce Commission where McDonald's grandfather application is pending.

(c) The record here conclusively shows that McDonald, a purely interstate operator, has complied with all requirements of Texas save and except he has not obtained a state interstate certificate and the Texas law does not require and has never required him to have such a certificate. The fact that the Court of Civil Appeals at Austin dissolved McDonald's injunction obtained before the Federal law was enacted does not brand McDonald as a law violator for the reason that after enactment of the Federal statute McDonald no longer needed a state injunction restraining respondents from arresting his drivers for not having a state interstate certificate which was

not required of him under Texas law. Again the record affirmatively discloses that McDonald's original injunction in the state court at Austin was not effectively dissolved until after he (McDonald) obtained an injunction in the Federal Court at Fort Worth on which this case is based. Assuredly, this Court is wrong in saying that McDonald was a law violator and not in good faith for not having a state interstate certificate when under Texas law, as properly construed, he was not required to have such a certificate even before the Federal Law was enacted.

Again respondents, as state officers, should not be permitted to arrest McDonald's drivers and put him out of business on the ground that he does not come within the grandfather clause until the Interstate Commerce Commission has had an opportunity to pass on the question of his bona fide operation. The exact effect of the decision of this Court in this case is to determine prematurely the merits of McDonald's grandfather application now pending in the Interstate Commerce Commission before that Commission has had an opportunity to pass on it and before there has been any appeal from any decision of the Interstate Commerce Commission on McDonald's application to the Federal Courts.

Even before the State Supreme Court of Texas in *Southwestern Greyhound Lines, Inc., v. Railroad Commission of Texas*, 99 S. W. (2d) 263, held that the Federal Motor Carrier Act of 1935 superseded state legislation except as to local police measures and even before it was held by the Austin Court of Civil Ap-

peals in *Rail oad Commission of Texas v. Bates*, 108 S. W. (2d) 286, that just such a person as McDonald was not required to have a state interstate certificate as a condition precedent to grandfather operation under the Federal Act, a Texas three-Judge Federal Court in 1932, and long before the enactment of the Federal Act of 1935, in interpreting the Texas Motor Carrier law, held in terms that a purely interstate motor carrier did not have to have a state interstate certificate of convenience and necessity, in order to operate. The error of this Court's decision, simply stated, in this: That the respondents are not asserting their right to arrest the drivers of McDonald on the ground that he is violataing some rule of safety promulgated by the Railroad Commission of Texas, or that he has violated some police measure, rule or regulation.

Respondents are asserting their right to arrest McDonald's drivers and stop his operation solely on the ground that he does not have from respondents a state interstate certificate of public convenience and necessity. Under this record there is utterly no ground for saying that McDonald has violated any law in Texas other than the ground asserted by respondents that he (McDonald) is and has been a law violator for the simple reason that respondents have never given him *authority* or *permission* to operate in interstate commerce; and under the authorities there simply is no statute in Texas authorizing respondents to exact a state interstate certificate from McDonald other than the decision of the Circuit Court

of Appeals in this case. The doctrine of dual certificates promulgated by the Circuit Court of Appeals in this case is the same doctrine promulgated by the Court of Civil Appeals at Austin in the case of *Railroad Commission of Texas v. Southwestern Greyhound Lines, Inc.*, 92 S. W. (2d) 296, and this decision of the Austin appellate court was expressly reversed by the Supreme Court of Texas on appeal in *Southwestern Greyhound Lines, Inc., v. Railroad Commission of Texas*, 99 S. W. (2d) 263.

This Court apparently is laboring under the view that McDonald has violated some rule of the Commission with reference to safety or condition of roads promulgated by it. This is not true. The only thing McDonald has done which the Commission condemns is that he has received no certificate of convenience and necessity from it (the only certificate it is authorized to issue) and we assert earnestly and insistently that no authority is given to the respondent Commissioners by any statute in Texas whatsoever to exact from McDonald a certificate authorizing him to operate in interstate commerce.

We again emphasize that in our view this Court should not prematurely, in a matter of complicated administrative law, pass finally on the question of McDonald's bona fide operation until the Interstate Commerce Commission, to whom that exact question has been entrusted by Congress in the first instance, shall have an opportunity to pass on that matter. But if this Court thinks the question of McDonald's bona fides is a law question and is properly before

this Court in this case, nevertheless we assert that this Court in branding McDonald as a law violator is making such decision exactly contrary to the decisions of the Austin Court of Civil Appeals in *Railroad Commission v. Bates*, supra, which decision followed the construction of the Texas Motor Carrier law in the Supreme Court in *Southwestern Greyhound Lines, Inc., v. Railroad Commission*, supra. In a word, we assert that this Court in order to brand McDonald as a law violator and as not being in good faith is forced to hold this because he has no state interstate certificate when our own high courts in Texas say in exactly similar cases that he is not by law required to have such a certificate.

In order for this Court to hold McDonald a law violator, it must under this record approve the remarkable doctrine of the New Orleans Court that an interstate operator must have authority and permission of both state and nation to operate at all. That he must have two certificates of authority. *No question is presented here of the general authority of a state to enact police measures for the protection of state highways applicable alike to intra and interstate operators.* All such measures in existence in Texas have been obeyed to the letter by McDonald.

GROUND NO. I

The question of "bona fide operation" is distinctly one of fact. The original exclusive jurisdiction to determine such fact question is committed to the Interstate Commerce Commission under the Motor Carrier Act, 1935. Obviously it is error for this Honorable Court to assume original jurisdiction to determine this issue contrary to the statute and deprive the Interstate Commerce Commission of its original statutory jurisdiction and this petitioner the right of obtaining a finding and adjudication by the body of original jurisdiction. Briefly stated this Honorable Court has overreached its original jurisdiction.

AUTHORITIES

Great Northern Ry. Co. v. Merchant's Elevator Co., 259 U. S. 285, 42 Sup. Ct. 477.

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B. & O. Ry. Co. v. Pitcairn, 215 U. S. 481, 30 Sup. Ct. 164.

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United States v. Pacific & Artic Co., 228 U. S. 87, 33 Sup. Ct. 443.

Dayton Goose Creek Ry. Co. v. U. S., 263 U. S. 456, 44 Sup. Ct. 169.

Texas & Pacific Ry. Co. v. Gulf, C. & S. F. Ry. Co., 270 U. S. 266, 46 Sup. Ct. 263.

United States v. Illinois Central R. Co., 291 U. S. 457, 54 Sup. Ct. 471.

Atlantic Coast Line Ry. Co. v. Hampton, 80 Fed. Supp. 797.

STATEMENT

Section 204, Subsection (6), Motor Carrier Act, 1935, under "General duties and powers of the Commission," provides:

> (6) "To administer, execute, and enforce all other provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and"

Section 205 (F) provides:

> (f) "In accordance with rules prescribed by the Commission, reasonable notice shall be afforded, in connection with any proceeding under this part, to interested parties and to the board of any State, or to the governor if there be no board, in which the motor-carrier operations involved in the proceeding are or are proposed to be conducted, and opportunity for hearing and for intervention in connection with any such proceeding shall be afforded to all interested parties."

Sections 206 and 207 authorize the Interstate Commerce Commission to prescribe forms on which appli-

cations shall be made and the Act throughout shows that the Commission may require such proof of "bona fide operation" as it may think necessary, and the Commission has prescribed forms and required proof, having held thousands of hearings on this very point.

McDonald filed his application (T. R. 36) and the same is now pending. (Report and Recommended Order of Joint Board 16 in M. C. 80, 415 and I. C. C. Brief page 17.) It will not be disputed that the Railroad Commission of Texas appeared and contested the "bona fide operation" of McDonald at the hearing before Joint Board 16. There has been no final determination of that issue by the Interstate Commerce Commission.

ARGUMENT

The term "bona fide" as defined by the courts simply means "without fraud, collusion, or deception." 8 *C. J.* 1145.

Bouvier's Law Dictionary, Vol. 1, defines the term "bona fide" as follows:

> "Good faith, honesty as distinguished from mala-fides (bad faith)."

Webster's New International Dictionary defines the term "Bona fide" as:

> "In or with good faith; without fraud or deceit; real or really; actual or actually; genuine or genuinely; as to act bona fide; a bona fide transaction."

This Court itself, in disposing of this case in its opinion of December 5, 1938, used the language:

> "The expression 'in bona fide operation' suggests *absence of evasion, includes the idea that mere ability to serve* as a common carrier is not enough, *includes actual rather than potential or simulated service.* * * *"

Practically each expression in the quotation implying that a proper determination of the phrase "in bona fide operation" *requires a finding of fact.*

If the term "bona fide" simply means good faith, honesty, as distinguished from malafides, then the question of "bona fides" is a question of motive or intent, *such questions involving findings of fact.*

The Interstate Commerce Commission in the Slagle case, 2 M. C. C. 12, in making a determination of the question of the bona fides of Slagle's operation, said:

> "The question, as we see it, is of fact rather than of law. Were the operations openly conducted without any element of pretense, disguise, or concealment, and in such a manner as to indicate a real intent to conduct and maintain a transportation business? Operations so conducted are the bona fide operations contemplated by the Act."

It seems to us that there can be no question but that what is or is not a "bona fide operation" is purely a question of fact and that the exclusive original jurisdiction to determine this fact question has been first committed to the Interstate Commerce Commission; that this Court under the authority cited here-

inabove is without jurisdiction to determine the question of "bona fide operation" in McDonald's case until such time as the administrative body, to whom the original exclusive jurisdiction has been committed by the Motor Carrier Act, 1935, has first made such a determination, and that the only possible manner in which such a question could be before this Court, or any other court, would be upon a direct appeal from an order of the Interstate Commerce Commission upon such finding.

We understand perfectly well that where there is nothing but a question of law to be determined that it is not necessary to resort to the Interstate Commerce Commission, but it is equally well settled by the decisions of this Court that where there are questions of fact involved that resort must be first had to the Interstate Commerce Commission and that the courts are without jurisdiction to determine such fact issues until the administrative body or commission has first passed upon the question. The Interstate Commerce Commission has not yet finally acted in the McDonald case. The application is still pending before that Commission.

After the filing of McDonald's application before the Interstate Commerce Commission, the respondents in this Court filed with the Interstate Commerce Commission what is there termed a protest to the granting of McDonald's application and the issuance to him of a certificate, *and raised identically the same question before that administrative commission which the respondents have attempted to raise in this Court,*

and upon which this Court determined this case. The Interstate Commerce Commission, through its Joint Board No. 16, as constituted under the Act, issued a favorable report and recommended order holding that the majority of the routes applied for by McDonald were being operated in a bona fide manner by McDonald on June 1, 1935, and continuously since. The respondents here likewise filed a brief involving this identical question before the Interstate Commerce Commission in the Slagle case, supra, which case was determined adversely to their contention.

Undoubtedly the question of what is a "bona fide operation" is a question of fact. Questions of honesty, fraud, and deception are always questions of fact. The Court used the language, "absence of evasion" which is certainly a question of fact. This Court used the words "actual rather than potential or simulated service," which beyond any doubt implies findings on questions of fact. If we are correct in our contention, that what is or is not a "bona fide operation" is first a question of fact, then under the authorities cited hereinabove this Court is without jurisdiction to determine this case in the manner in which it has determined it, and we verily believe that this Court will set its former opinion aside, which we most earnestly pray that it do, and hold that under the proviso of Section 206, Motor Carrier Act, 1935, that the trial court was correct in issuing its permanent injunction and that the petitioner is entitled to continue to operate until such time as the Commission shall otherwise order, that being the language of the statute.

If the question of the "bona fides" of petitioner's operation is before the Court, which we do not see how it possibly could be, then this cause merits the further earnest consideration of this Court, especially in view of the opinion of this Court in which this Court in *Ware v. Hylton*, 3 Dallas 199, 1 L. Ed. 568, in which this Court, in construing the term "bona fide" when used in a statute said:

> "Bona fide is a legal, technical expression and the law of Great Britain and this country has annexed a certain idea to it. *It is a term used in statutes in England and in acts of Assembly of all the states and signifies a thing done really, with good faith, without fraud or deceit or collusion or trust.*"

Undoubtedly that is all the phrase means as used in the Motor Carrier Act, 1935, and if so this Court is manifestly in error in making the determination which it has of this case, and, in fact, in making any determination of this case on this particular point for the very obvious reason that fraud or deceit or collusion or trust involves a state of mind and the finding of questions of fact.

Will the Court please ask itself: What happens to the language in Sec. 206 "and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate?"

It is clear to us that if a carrier was in "bona fide"

operation on June 1, 1935, only as it may have been operating under authority from the state, the quoted language had as well be deleted from the statute; for, if as a matter of law, because the petitioner had not received authority from the Railroad Commission (and he was not so required) he was not, therefore, as this Court has said in bona fide operation, then the provision with reference to registration under any code of fair competition becomes wholly immaterial.

Yet Congress provides that that fact shall be considered in arriving at the determination. *This Court's determination is utterly inconsistent with this provision of the statute.*

Furthermore, if the petitioner was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes, or within the territory for which application is made and has so operated since that time, he is entitled to a certificate without the Commission's "requiring further proof that public convenience and necessity will be served by such operations, and without further proceedings" if application be filed within the time required as fixed by the statute.

However, petitioner is given a further right in the section *which flows from the mere fact of filing the application*, namely, "pending the determination of any such application the continuance of such operation shall be lawful."

These provisions to our minds makes it conclusive that the Interstate Commerce Commission has exclu-

sive original jurisdiction to determine whether the applicant should be given a certificate under the "grandfather clause." *The point is:* Congress itself specified a certain result which would flow from the mere filing of the application, namely that "pending the determination of any such application, the continuance of such operation shall be lawful." *The decision in this case is utterly inconsistent with this provision and nullifies that language of the statute.*

May we remind this Court that in *Coffin v. United States*, 162 U. S. 664, 16 Sup. Ct. 943, this Court said:

> "The expression 'Bona fide' was used in the sense of 'real' and 'actual'."

We most earnestly invite this Court's attention to the decision of the Interstate Commerce Commission in the Slagle case, supra, which was considered and reconsidered by the Interstate Commerce Commission both on oral argument and upon brief after literally dozens of interested parties, including many state commissions, and the Texas Railroad Commission, had intervened and presented briefs and arguments, and in which the Interstate Commerce Commission said:

> "Prior to the passage of the Act, most of our states had undertaken to regulate to some extent motor carriers engaged in intrastate commerce, and some had undertaken to extend the regulation in various respects to those engaged in interstate or foreign commerce. There were a great variety of such laws and like variations in

enforcement. Enforcement was vigorous in some states and lax in others, and, as was natural, laxity was more prevalent as to interstate operations. In the absence of Federal regulations, the situation was a most difficult one for the states, which was one of the reasons why their regulatory authorities very generally favored such regulation. The records show that Congress was fully informed in regard to this situation. It might readily, in clear and unmistakable language, have made compliance with state laws a pre-requisite to rights under the 'grandfather' clauses, and have indicated how we should determine the fact of compliance or non-compliance. This, however, it did not do. Instead, it employed the phrase '*bona fide* operation,' making registration 'under any code of fair competition,' evidence of such operation on June 1, 1935, *but saying nothing about state laws*, which were not mentioned in committee reports or debates in connection with the phrase '*bona fide*' operation.

"*At two places in the Act, Congress made specific provision for compliance with state laws as a prerequisite to obtaining a privilege.* Under section 203 (b) (8) a carrier of passengers is not entitled to an exemption that he might otherwise be accorded unless he is 'lawfully engaged in the intrastate transportation of passengers in accordance with the laws of each state having jurisdiction.' Under Section 206 (a) a carrier who has procured a certificate under state laws authorizing intrastate common carrier service is relieved of the requirement of making proof of public convenience and necessity for conducting the same operations in interstate commerce. It seems unlikely that if Congress had intended to

make compliance with State laws a condition precedent to 'grandfather' privileges, it would have failed to make the same specific provisions that it did in respect to other privileges.

"It seems clear that protestants' interpretation of the Act would, in substance and practical effects, require the exercise on our part of judicial functions in respect of state laws. That is to say, in the absence of either admission by an applicant of law violation or proper proof of conviction of violation in a court of competent jurisdiction, the responsibility of determining the matter would be upon us. The Act makes it a prerequisite to a grant of a certificate or a permit under the 'grandfather' clauses, not only that appellant was 'in bona fide operation' on the date specified, but also that it 'has so operated since that time.' It follows that, in the absence of admissions or convictions, it would be necessary for us to examine into the conduct of an applicant with reference to applicable state laws over a period of time, which might be long. To determine the fact of compliance or non-compliance, it would be our responsibility, first, to ascertain what the state law is; second, to construe that law; and third, to apply it as construed to the facts of the case. The responsibility to determine whether a law has been violated would also, presumably, carry with it a responsibility to determine whether the law itself is valid, for a statute without legal force could not operate to penalize one who failed to comply therewith. Protestants refer us to no provision of the Act which would imply that we have such broad responsibility and authority in the inter-

pretation and application of state statutes, and we find no such provision.

"What might often be involved in such a task is well illustrated by applicant's situation here with respect to the law of Iowa. Whether or not the applicant violated the law of that state is dependent, for one thing, upon whether he was a contract carrier or a common carrier. At the time he began operations in Iowa, he thought that he was a contract carrier, and he was still of that opinion when he filed his application with us under the 'grandfather' clause. We have found that under the definitions in the Act he was and is a common carrier, but whether he was and is such a carrier, rather than a contract carrier, under the statutes of Iowa is another matter. It would require careful consideration of those statutes and interpretation of their provisions. If applicant actually was, under the Iowa law, what he believed himself to be, namely, a contract carrier, he did not violate the law of that state; and at no time prior to this proceeding, apparently, did the state authorities undertake to question his status in this respect.

"Moreover, where the fact of noncompliance with state laws is admitted by an applicant or properly proved to us, we cannot accept protestants' contention that this fact alone requires denial of an application under the 'grandfather' clause. The words 'bona fide' *certainly makes it necessary to consider also the mental attitude of the offender, for where good faith is involved, the maxim 'ignorance of the law is no excuse,' loses its force.* We cannot ignore the facts that it has sometimes been difficult for motor carriers to keep fully informed in regard to the require-

ment of state laws, that some states have permitted rather general disregard of certain requirements, and that operators might in good faith challenge the validity of some state statutes affecting interstate commerce. It has for example, been held repeatedly that a state cannot prohibit or obstruct interstate transportation by motor vericles on the ground that the existing similar facilities are adequate. *Buck v. Kuykendall*, 267 U. S. 307; *Bush v. Malloy*, 267 U. S. 317; *Sprout v. South Bend*, 277 U. S. 163. *Nor, presumably, can a state accomplish the same result through indirection by assuming to base its action on other and valid grounds but which the facts do not actually support.*

"In the light of the reasons stated for believing that Congress could not have intended the interpretation of the law urged upon us by protestants, the lack of any clear delegation of authority and responsibility to try in this connection the question of whether state laws have been violated and the circumstances under which various failures to comply with state laws may have occurred, we conclude that the fact that an applicant under the 'grandfather' clause has not complied with state laws is not by itself sufficient to bar his right to authority under that provision of the Act.

"Protestants argue vigorously against this conclusion, and urge that it amounts to condoning and encouraging violations of the laws of the states, that it leaves the states without any effective method of preventing persistent violators of their laws from obtaining authority to operate within their borders in interstate or foreign commerce, and that for these reasons it is incon-

sistent with that portion of the declaration of the policy of Congress in section 202 (a) wherein cooperation 'with the several states and the duly authorized officials thereof' is required. However, for reasons next discussed we cannot agree that our conclusion herein will have the effect which protestants suggest.

"To the extent that state laws are properly applicable to interstate operations they can be enforced by the states, and we can assume that they have been and will be so enforced. Infractions do not, of course, always concern the right to operate. However, in considering the action of the states in enforcement of certain classes of their statutes, the courts have sustained repeatedly their right to forbid operations within their borders in interstate or foreign commerce until such time as compliance with such laws has been effected. In the event of the failure of an operator to comply with such state statutes, the states have the power to stop his operations, and it is a reasonable assumption that in proper cases they have exercised in the past, and in the future will continue to exercise, such power, Our conclusions in this or any other proceedings cannot affect this right of the states.

"Having determined that 'bona fide' as used in the Act does not mean that an operator must prove compliance with state laws in his operations, there remains for consideration the reasonable interpretation which is to be placed upon this language. The Latin words 'bona fide' mean 'in good faith.' Webster's New International Dictionary defines 'bona fide' as 'in or with good faith; without fraud or deceit; real or really; actual or actually; genuine or genuinely.' As

defined in Black's Law Dictionary, the words mean 'in or with good faith; honestly, openly and sincerely; without deceit or fraud.' The Supreme Court in *Ware v. Hylton*, 3 U. S. 199, 241, defined them as follows:

> 'Bona is a legal technical expression; and the law of Great Britain and this country has annexed a certain idea to it. It is a term used in statutes in England, and in Acts of Assembly of all the states, and signifies a thing done really, with a good faith, without fraud, or deceit or collusion, or trust.'

"The Supreme Court of the State of Washington in *State ex rel Great Northern Ry. Co. v. Dept. of Public Works*, 219 Pac. 878, considered an appeal from an order of the Department of Public Works granting a certificate of convenience and necessity to a certain motor carrier. The application was granted upon the ground that the carrier 'was actually operating in good faith over the route on January 15, 1921,' that date being the statutory date determining rights under the grandfather clause in the State Act. The Court said:

> 'As we read the Act, the particular provision now under consideration was intended to give a preference right to all operators in good faith, who had been operating without knowledge that the Legislature would so act, and to deny a preference right to those who, after the Legislature began the consideration of the subject, in bad faith commenced to operate for the purpose of forestalling the legislative action.'

"We are clear that one purpose of the use of

the words 'bona fide' operation was to deny rights under the grandfather clauses to those who, with knowledge of the impending legislation, should make a show of commencing operations, not in pursuance of any well-conceived plan of furnishing transportation service, but for the purpose of thereby securing rights to operate having in themselves a money value. The words may properly be given an even broader application to exclude operations conducted surreptitiously or in disguise or involving some other element of pretense or concealment for the purpose of preventing state authorities from having the opportunity of enforcing statutory requirements.

"The question, as we see it, is of fact rather than law. Were the operations openly conducted without any element of pretense, disguise, or concealment and in such a manner as to indicate a real intent to conduct and maintain a transportation business? Operations so conducted are the 'bona fide' operations contemplated by the Act."

It would be impossible for us to add anything to what the Interstate Commerce Commission has said.

We do point out, however, that under the Texas Motor Truck Law McDonald was not required to have anything at all except, that if the Texas law is applicable under its terms to an interstate operator (which it cannot be) then under the provisions of Section 3 of said act, it is required that if he operate as a common carrier motor carrier for hire that he have a certificate of convenience and necessity in the following language:

> "Without first having obtained from the Commission * * * a certificate of public convenience and necessity *pursuant to a findnig to the effect that public convenience and necessity require such operation.*"

The Railroad Commission of Texas disclaimed any contention that your petitioner had to have any such instrument as the statute required. It is well that the Railroad Commission of Texas should make such a disclaimer because the proposition is so well settled that it is not now debatable that the state did not have any such power. *Buck v. Kuykendall*, 267 U. S. 307; *Bush v. Malloy*, 267 U. S. 325; *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570; *Smith v. Calhoon*, 75 L. Ed. 812, as well as the *Sage v. Baldwin* case hereafter cited.

The contention of the Attorney General in this case on behalf of respondents with reference to the bona fides of McDonald's operation and the determination by this Court must necessarily involve numerous inquiries which obviously this Court has not considered, but which this Court necessarily must consider in justice to petitioner if the cause is to be determined upon the proposition that petitioner was operating "in defiance of the law."

Some of the inquiries which this Court would necessarily be required to consider would be, did petitioner actually operate in violation of the law of the State of Texas? The Court has only inferentially determined that question by apparent mere assumption because such an inquiry and such a determination

would involve the further inquiry of, first, what do the laws of Texas require, and, second, did petitioner meet these requirements. It must necessarily involve the inquiry, *did the laws of the State of Texas apply to petitioner's business—that of a common carrier, motor carrier engaged exclusively in interstate commerce.* If this question be answered in the affirmative, then another inquiry would arise, and which was in fact the occasion for this lawsuit, and that is, are such laws consistent with the commerce clause of the Federal Constitution. All of these inquiries must be quite pertinent and obviously the opinion of this Court goes around answering any such inquiries, but they must be determined in order to reach a proper determination of this cause.

If this case is to be decided, however, upon the question of bona fides of petitioner's operation, which at this time is without the jurisdiction of this Court, but if it is to be so decided, then still that does not depend upon whether McDonald's operation was *legal* and *lawful.*

As pointed out by the Interstate Commerce Commission in the Slagle case, supra, if Congress had intended to make compliance with state laws a prerequisite to the issuance of a certificate under the grandfather clause it would undoubtedly have used appropriate language which it utterly failed to do.

We have heretofore cited this Court's holding in *Ware v. Hylton*, supra, as well as in *Coffin v. United States*, supra. May we call attention to the fact that in the various editions of "Words & Phrases" numer-

ous cases are cited wherein the term "bona fides" is construed in its use as an adjective. Thus the term "bona fide claimant," "bona fide entryman," "bona fide guest," etc., simply means "actual" or "real." In *Stephens v. Union Grade School District No. 2*, 275 Pac. 1056, the Court held that "bona fide residence" means actual residence.

In *People v. Smith*, 295 Pac. 105, the court held that "bona fide sale" means an actual sale.

In *Weaver v. Ann Arbor Ry. Co.*, 102 N. W. 1937, the court held that "bona fide employee" as used in connection with a drover's pass simply meant a person actually in charge of livestock.

Under the foregoing authorities, we submit that petitioner was *really* in operation, *actually* in operation, *genuinely* in operation, and was operating in *good faith*, in *all sincerity*, without *make-believe*, and *without fraud, deceit, collusion or trust*, and demonstrates that petitioner was in bona fide operation on June 1, 1935.

The legislative history of an act must have some bearing and be given some consideration in the construction of the act, or in the meaning to be given to words used therein. In this connection we beg permission of the court to refer to the Interstate Commerce Commission report in Motor Bus and Motor Truck Operation, 140 I. C. C. 685, where the Commission, in discussing the question of motor bus and motor truck legislation and the matter of "grandfather clauses" in state statutes, said:

"In some states the regulatory laws provide that a motor carrier *actually* in operation on a certain date and continuously after that date and at the time of application is entitled to a certificate upon filing application and showing that its operation on and subsequent to that date was in *good faith*. Such a provision is sometimes referred to as a 'grandfather' clause. In other states there is no such provision.

"It is only fair that the interests of motor carrier operators who have pioneered and have operated their property successfully should be protected and the fact that an applicant for a certificate of convenience and necessity has been in *bona fide* operation continuously for a reasonable period prior to the enactment of regulatory legislation and at the time application is made for a certificate should be considered prima facie evidence as to the convenience and necessity of such operation." (Emphasis ours.)

The Commission's conclusion (No. 12) was that:

"The law should provide that the fact that an applicant for a certificate of public convenience and necessity was in *bona fide* operation as a common carrier over the route or between the termini described in the application at least one year prior to the first day of the legislative session in which such law is enacted and since then, and at the time application is made has been continuously in operation should be considered prima facie evidence as to the public convenience and necessity of such operation." (Emphasis ours.)

Likewise, in *Co-ordination of Motor Transporta-*

tion, 182 I. C. C. 263, speaking of the same subject, the Commission said:

> "The laws of some states provide that a motor carrier *actually* in operation on a certain date and continuously between that date and the date of application is entitled to a certificate of convenience and necessity upon filing an application and showing that the operation was in *good faith*. Other states have no such provisions, and all applicants for certificates, whether they have been in operation over a stated period prior to the enactment of legislation or have not yet commenced operation, are placed on the same footing.
>
> "The fact of continuous *bona fide* operation for a reasonable period prior to the enactment of regulatory legislation and at the time of the application for a certificate is considered evidence, conclusive or prima facie, as the case may be, as to the existence of public convenience and necessity." (Emphasis ours.)

Accordingly, the Commission recommended to Congress:

> "That certificates should be issued as a matter of course to *bona fide* operators who have been in business for a stated length of time prior to the effective date of the regulatory act, provided they comply with all other applicable provisions of the Act." (Emphasis ours.)

From the foregoing quotations it will be noted that the Commission was using the terms "bona fide" and "in good faith" interchangeably and both terms in the sense of *actual*.

Any remaining doubt of the Commission's understanding of the term "bona fide operation" is removed when recourse is had to the hearing before the sub-committee of the House Committee on appropriations, where the Commission was seeking an appropriation for the Bureau of Motor Carriers (R. pp. 37-56). Commissioner Eastman, speaking as Chairman of Division 5, the Motor Carrier Division, said:

> "The first section which is mentioned in the chart is called the section of certificates. Every common carrier has to have a certificate of convenience and necessity; every contract carrier must have a permit, and every broker a license. At the start, they are covered by what is called the 'grandfather clause.'. In other words, the men in operation on a certain date are entitled to certificates or permits automatically; but they must have been in *bona fide* operation on the routes designated in their applications. Therefore, it will be necessary to check up the statements and determine whether they were *actually in operation* on such routes on that date. Afterward, the motor carrier law requires hearings to determine if further operators are entitled to certificates or licenses to meet public convenience and necessity." (Emphasis ours.)

It should be borne in mind that many of the recommendations made by the Commission to Congress were incorporated bodily into the Motor Carrier Act, 1935.

When the Motor Carrier Act, 1935, was being considered by the House of Representatives, Mr. Sadow-

ski, a member of the House, was explaining the various provisions of the Bill to the other members of Congress. He said:

> "Section 206 provides for certificates of public convenience and necessity for common carriers giving to all common carriers in operation prior to June 1, 1935, certificates *as a matter of course.*" (Congressional Record, Wednesday, July 16, 1935, p. 12-685.) (Emphasis ours.)

A little later the following colloquy occurred between two other members of the House:

> "Mr. White. Then a certificate of necessity and convenience will be in the nature of a franchise to use the roads to the exclusion of those who have no such certificate.
>
> "Mr. Holmes. Of course, every man who is now a common carrier *automatically* gets a certificate. But when new applications are made, this will be applicable." (Congressional Record, Wednesday, July 16, 1935, p. 12692.) (Emphasis ours.)

And in this connection further, may we refer to *Bowers v. Max Kaufman & Co.*, 18 Fed. (2d) 69, where the Circuit Court of Appeals for the Second Circuit construed the term "bona fide payment" and held that it means "actually, sincerely, and in good faith paid," the court saying:

> *"It is not necessary to hold that it means moneys legally paid in. If so, Congress would have used the phrase, legally paid in."* (Emphasis ours.)

This Honorable Court, in its opinion, in referring to that portion of Section 206, Motor Carrier Act, 1935, which reads:

> "Pending the determination of any such application the continuance of such operation shall be lawful,"

has said:

> "Plainly, the proviso does not extend to one operating as a common carrier on the public highways of a state in defiance of its laws."

May we most respectfully express a slight degree of surprise and shock that this Court should attribute to petitioner an operation "in defiance" of the laws of the State of Texas when Section 20 of the Motor Truck Law of Texas, Art. 911(b), Revised Civil Statutes, 1925, authorizes an appeal from orders of the Railroad Commission of Texas and authorizes District Courts of Travis County, Texas, to set aside such orders and to grant injunctions. McDonald, the petitioner herein, was following his remedies under the statute in having received a permanent injunction from the trial court and could not assume that the trial court judge acted unlawfully nor erroneously.

The District Courts of Texas are courts of general jurisdiction with general authority to issue injunctions under Art. 5, Section 8 of the Constitution of Texas, and under Art. 4662, Revised Civil Statutes of Texas, 1925.

The Constitution of Texas, by Art. 16, requires a district judge to take the following oath of office:

> "Art. 16, Sec. 1. Members of the Legislature and all officers before they enter upon the duties of their offices shall take the following oath or affrmation: I, ——— do hereby solemnly swear (or affirm), that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ——— according to the best of my skill and ability, *agreeably to the Constitution and laws of the United States and of this State*," etc. (Emphasis ours.)

We do not see what process of reasoning would lead to the conclusion that a district judge of Texas would authorize your petitioner to do anything "in defiance" of the laws of the State of Texas. We do not see how any such unlawful and defiant operation can be ascribed to petitioner without ascribing to the district court of Travis County, Texas, the same unlawfully acts in defiance of the laws of the State of Texas. Such, surely is not the case nor the meaning of this Court in the language which it has used in its decision in this case.

Surely no court would be regarded as authorizing the doing of an act in defiance of the laws of this state, and if so, then the Federal Courts have defied the laws of this State in *Sage v. Baldwin*, 55 Fed. (2d) 968, and in many other cases, including *Galveston Truck Lines v. Railroad Commission of Texas*, 2 Fed. Supp. 488, with the express approval of this Court in 289 U. S. 708, 53 Sup. Ct. 694. We mildly wonder what this Court would say as to the bona fide of the operation of Galveston Truck Lines which has never had a permit or certificate issued by the

Railroad Commission of Texas, but which has operated under an injunction of a Federal Court with the approval of this Court since January 11, 1933.

If the phrase "bona fide" means what this Court has said it does in the case of *Ware v. Hylton*, supra, and as defined by Webster and Bouvier, how is it possible to ascribe fraud, deceit, collusion, or trust to the acts of McDonald in his operation with the express approval of the court under a final and permanent injunction which was just as final and permanent as the trial court could make it, and issued after a final trial on the merits without ascribing some act of fraud or deceit or collusion or trust to the district judge of this state which granted the injunction.

How can this Court so easily conclude that petitioner was operating in defiance of the laws of the State of Texas when Section 17 of the Texas Motor Truck Law, Art. 1690(b), Penal Code of Texas, 1925, Acts 42nd Legislature, 1931, p. 480, Chapt. 277, provides penalties, and Sub-section (c) makes the following provision:

> "(c) Upon the violation of any provision of this Act, or upon the violation of any rule, regulation, order, or decree of the Commission promulgated under the terms of this Act, *any District Court of any county where such violation occurs shall have the power to restrain and enjoin the person, firm or corporation so offending from further violating the provisions of this Act or from further violating any of the rules, regulations, orders and decrees of the Commission.*

> *Such injunctive relief may be granted upon the application of the Commission, the Attorney General or any District or County Attorney.* No bond shall be required when such injunctive relief is sought upon the application of the Commission, Attorney General or any District or County Attorney. Such relief may be granted in suits for penalties as provided in subdivision (b) of this section, but a suit for penalty shall not be a condition precedent to the injunctive relief provided by this subdivision." (Emphasis ours.)

Surely it must be assumed that the Railroad Commission of Texas, the Attorney General of Texas, or some district or county attorney of this state would have performed his duty and have enjoined petitioner if he were operating "in defiance" of its laws. The Attorney General of Texas was present in the trial of petitioner's case in the district court and represented the Railroad Commission of Texas, and he likewise was under a constitutional oath to support and uphold the constitution and laws of this state, and if petitioner's operation was in defiance of the laws of this state, why did he not enjoin McDonald in that proceeding if nowhere else or at no other time? It is easy to say that petitioner was operating in defiance of the laws of this state, but we submit that it is quite difficult to follow that statement up with any logical reasoning which would lead to any such conclusion.

GROUND NO. II

The Supreme Court of Texas followed by the Court of Civil Appeals of Texas having construed the Texas statute and held that operators similarly situated to petitioner were in "bona fide" operation and entitled to continue to operate until the Interstate Commerce Commission should otherwise order in spite of the Texas statute and having refused to hold that such an operator as petitioner was operating in "defiance" of Texas law is necessarily binding upon the Federal Courts.

AUTHORITIES

Burgess v. Seligman et al, 107 U. S. 20, 2 Sup. Ct. 10.

Southwestern Greyhound Lines, Inc., v. Railroad Commission (Sup. Ct.), 99 S. W. (2d) 268.

Railroad Commission v. Bates (Ct. Civil App.), 108 S. W. (2d) 286.

Railroad Commission v. Futch (Civil App.), 108 S. W. (2d) 289.

Railroad Commission v. Peterson (Civil App.), 108 S. W. (2d) 289.

Railroad Commission v. Williams (Civil App.), 108 S. W. (2d) 290.

Thompson et al v. Rayburn, 109 S. W. (2d) 789.

Senn v. Tile Layers Protective Union, 301 U. S. 468, 57 Sup. Ct. 857.

Lee v. Bickell, 292 U. S. 415, 54 Sup. Ct. 727.

Georgia Ry. & Electric Co. v. Decatur, 295 U. S. 165, 55 Sup. Ct. 701.

Coombes v. Getz, 285 U. S. 434, 52 Sup. Ct. 435.

Price v. Illinois, 238 U. S. 446, 35 Sup. Ct. 892.

Sage v. Baldwin, 55 Fed. (2d) 968.

The only possible conclusion to be gained from the Bates case, supra, wherein the courts permanently enjoined the Railroad Commission, is that that court was following *Sage v. Baldwin*, supra, which directly held that the Railroad Commission could not require of an exclusive interstate carrier a certificate. It has always been the law of this state since *Sage v. Baldwin* that no certificate could be required of such an operator. The Railroad Commission even disclaims such power.

ARGUMENT

Still this Court, utterly disregarding all issues involved in this case except the issue of "bona fide operation," if that issue be involved, and which is by no means conceded, has chosen to determine this case upon its own construction of the Texas Motor Carrier Law, Art. 911(b), Revised Civil Statutes, 1925, Acts of 42nd Legislature, p. 480, chapt. 277, and held that petitioner was not within the proviso of section 206, Motor Carrier Act, 1935, because he was operating, as this Court says, "in defiance of its laws." Such a determination therefore permits this case to turn wholly upon this Court's construction of the Texas Motor Truck law.

There is a very definite and settled rule, as shown by the authorities cited hereinabove and for which this Court needs no citation of authority, that Federal Courts, including the Supreme Court of the United States, are bound by the construction placed upon state constitutions and statutes by the highest court of that state, and we think that rule applies here. The Supreme Court of Texas, followed in a number of cases by Courts of Civil Appeals of Texas, has placed no such construction as that upon the Texas Motor Truck law. In other words, the Supreme Court says that the petitioner was operating in defiance of the laws of Texas, yet the Texas Supreme Court and Courts of Civil Appeals of Texas have entertained utterly no such view. The construction placed upon the Texas statutes by the Texas courts, including the Supreme Court of Texas, and Courts of Civil Appeals of Texas, is binding, as we view it, upon this Court.

Among the authorities cited hereinabove will be found the *Southwestern Greyhound Lines* case, a case by the Supreme Court of Texas, subsequently followed by the Court of Civil Appeals in the Bates, Futch, Peterson, Williams, and Rayburn cases. Bates, Futch, Peterson, Williams, and Rayburn appealed to state courts for temporary injunctions to protect their operations pending determination of their applications before the Interstate Commerce Commission, and were in identically the same position that your petitioner here is in. That is, they had complied with every law or requirement of the State of Texas ex-

cept *the supposed requirement* that they must have a so-called state interstate certificate of convenience and necessity. The opinions in each of the cases mentioned will bear out this statement.

Being in identically the same position that your petitioner is in, each of those truck operators secured in the courts of Texas, in spite of the Texas Truck law, and after a construction of the Texas law, a permanent injunction against the Railroad Commission of Texas restraining interference by said Commission. Such construction of Texas law by Texas courts, which necessarily must hold that such operators were not operating in defiance of Texas laws, is binding upon this court, and we think should be followed by this court.

Let us bring again to the attention of this Court the proposition that petitioner could not have been operating in defiance of state laws *because it was established by the record in this case that petitioner had met every requirement of the Texas law except that of obtaining from the Railroad Commission of Texas a so-called state interstate certificate. The Railroad Commission of Texas could not require your petitioner to obtain any such certificate and that fact was early made clear in the administration of the Texas Truck Law* in the case of *Sage v. Baldwin*, 55 Fed. (2d) 968, in which Judge Atwell, writing for a three-judge statutory court, assembled under section 266 of the Judicial Code, said:

> "Preserving, therefore, the rights of the state and the right of the nation, the respondents will

be enjoined from interfering with the operation of the complainants or from arresting them for alleged violations of this law, so far as any rates may be concerned, or so far as any bond securing any shipper may be concerned, *or so far as any certificate of public convenience and necessity may be concerned.*" (Emphasis ours.)

Surely the foregoing opinion is clear and emphatic to the effect that the Railroad Commission of Texas cannot require that an exclusive interstate operator obtain from the Railroad Commission of Texas a certificate of public convenience and necessity. Such has been the law of this state since the *Sage v. Baldwin* case. Every other requirement which the Railroad Commission could possibly make of petitioner had been fully met by petitioner as will be shown by the findings of fact of the trial court in this case.

We trust that this Court will give serious consideration to *Railroad Commission of Texas, et al., v. Bates*, 108 S. W. (2d) 286, in which the court, following the Greyhound Lines case, supra, stated the contention of the appellee Bates, as follows:

"Appellee alleged that he has complied with all these provisions of the act *and is entitled to continue operations without a certificate* until his application has been passed upon by the Interstate Commerce Commission; that he has complied with all the rules and regulations over which the Railroad Commission has jurisdiction, and particularly with respect to the character of vehicles to be used and proper safety lights and equipment, and has furnished all kinds of

ous cases are cited wherein the term "bona fides" is construed in its use as an adjective. Thus the term "bona fide claimant," "bona fide entryman," "bona fide guest," etc., simply means "actual" or "real." In *Stephens v. Union Grade School District No. 2*, 275 Pac. 1056, the Court held that "bona fide residence" means actual residence.

In *People v. Smith*, 295 Pac. 105, the court held that "bona fide sale" means an actual sale.

In *Weaver v. Ann Arbor Ry. Co.*, 102 N. W. 1937, the court held that "bona fide employee" as used in connection with a drover's pass simply meant a person actually in charge of livestock.

Under the foregoing authorities, we submit that petitioner was *really* in operation, *actually* in operation, *genuinely* in operation, and was operating in *good faith*, in *all sincerity*, without *make-believe*, and *without fraud, deceit, collusion or trust*, and demonstrates that petitioner was in bona fide operation on June 1, 1935.

The legislative history of an act must have some bearing and be given some consideration in the construction of the act, or in the meaning to be given to words used therein. In this connection we beg permission of the court to refer to the Interstate Commerce Commission report in Motor Bus and Motor Truck Operation, 140 I. C. C. 685, where the Commission, in discussing the question of motor bus and motor truck legislation and the matter of "grandfather clauses" in state statutes, said:

"In some states the regulatory laws provide that a motor carrier *actually* in operation on a certain date and continuously after that date and at the time of application is entitled to a certificate upon filing application and showing that its operation on and subsequent to that date was in *good faith*. Such a provision is sometimes referred to as a 'grandfather' clause. In other states there is no such provision.

"It is only fair that the interests of motor carrier operators who have pioneered and have operated their property successfully should be protected and the fact that an applicant for a certificate of convenience and necessity has been in *bona fide* operation continuously for a reasonable period prior to the enactment of regulatory legislation and at the time application is made for a certificate should be considered prima facie evidence as to the convenience and necessity of such operation." (Emphasis ours.)

The Commission's conclusion (No. 12) was that:

"The law should provide that the fact that an applicant for a certificate of public convenience and necessity was in *bona fide* operation as a common carrier over the route or between the termini described in the application at least one year prior to the first day of the legislative session in which such law is enacted and since then, and at the time application is made has been continuously in operation should be considered prima facie evidence as to the public convenience and necessity of such operation." (Emphasis ours.)

Likewise, in *Co-ordination of Motor Transporta-*

tion, 182 I. C. C. 263, speaking of the same subject, the Commission said:

> "The laws of some states provide that a motor carrier *actually* in operation on a certain date and continuously between that date and the date of application is entitled to a certificate of convenience and necessity upon filing an application and showing that the operation was in *good faith*. Other states have no such provisions, and all applicants for certificates, whether they have been in operation over a stated period prior to the enactment of legislation or have not yet commenced operation, are placed on the same footing.
>
> "The fact of continuous *bona fide* operation for a reasonable period prior to the enactment of regulatory legislation and at the time of the application for a certificate is considered evidence, conclusive or prima facie, as the case may be, as to the existence of public convenience and necessity." (Emphasis ours.)

Accordingly, the Commission recommended to Congress:

> "That certificates should be issued as a matter of course to *bona fide* operators who have been in business for a stated length of time prior to the effective date of the regulatory act, provided they comply with all other applicable provisions of the Act." (Emphasis ours.)

From the foregoing quotations it will be noted that the Commission was using the terms "bona fide" and "in good faith" interchangeably and both terms in the sense of *actual*.

Any remaining doubt of the Commission's understanding of the term "bona fide operation" is removed when recourse is had to the hearing before the sub-committee of the House Committee on appropriations, where the Commission was seeking an appropriation for the Bureau of Motor Carriers (R. pp. 37-56). Commissioner Eastman, speaking as Chairman of Division 5, the Motor Carrier Division, said:

> "The first section which is mentioned in the chart is called the section of certificates. Every common carrier has to have a certificate of convenience and necessity; every contract carrier must have a permit, and every broker a license. At the start, they are covered by what is called the 'grandfather clause.' In other words, the men in operation on a certain date are entitled to certificates or permits automatically; but they must have been in *bona fide* operation on the routes designated in their applications. Therefore, it will be necessary to check up the statements and determine whether they were *actually in operation* on such routes on that date. Afterward, the motor carrier law requires hearings to determine if further operators are entitled to certificates or licenses to meet public convenience and necessity." (Emphasis ours.)

It should be borne in mind that many of the recommendations made by the Commission to Congress were incorporated bodily into the Motor Carrier Act, 1935.

When the Motor Carrier Act, 1935, was being considered by the House of Representatives, Mr. Sadow-

ski, a member of the House, was explaining the various provisions of the Bill to the other members of Congress. He said:

> "Section 206 provides for certificates of public convenience and necessity for common carriers giving to all common carriers in operation prior to June 1, 1935, certificates *as a matter of course.*" (Congressional Record, Wednesday, July 16, 1935, p. 12-685.) (Emphasis ours.)

A little later the following colloquy occurred between two other members of the House:

> "Mr. White. Then a certificate of necessity and convenience will be in the nature of a franchise to use the roads to the exclusion of those who have no such certificate.
>
> "Mr. Holmes. Of course, every man who is now a common carrier *automatically* gets a certificate. But when new applications are made, this will be applicable." (Congressional Record, Wednesday, July 16, 1935, p. 12692.) (Emphasis ours.)

And in this connection further, may we refer to *Bowers v. Max Kaufman & Co.*, 18 Fed. (2d) 69, where the Circuit Court of Appeals for the Second Circuit construed the term "bona fide payment" and held that it means "actually, sincerely, and in good faith paid," the court saying:

> *"It is not necessary to hold that it means moneys legally paid in. If so, Congress would have used the phrase, legally paid in."* (Emphasis ours.)

This Honorable Court, in its opinion, in referring to that portion of Section 206, Motor Carrier Act, 1935, which reads:

> "Pending the determination of any such application the continuance of such operation shall be lawful,"

has said:

> "Plainly, the proviso does not extend to one operating as a common carrier on the public highways of a state in defiance of its laws."

May we most respectfully express a slight degree of surprise and shock that this Court should attribute to petitioner an operation "in defiance" of the laws of the State of Texas when Section 20 of the Motor Truck Law of Texas, Art. 911(b), Revised Civil Statutes, 1925, authorizes an appeal from orders of the Railroad Commission of Texas and authorizes District Courts of Travis County, Texas, to set aside such orders and to grant injunctions. McDonald, the petitioner herein, was following his remedies under the statute in having received a permanent injunction from the trial court and could not assume that the trial court judge acted unlawfully nor erroneously.

The District Courts of Texas are courts of general jurisdiction with general authority to issue injunctions under Art. 5, Section 8 of the Constitution of Texas, and under Art. 4662, Revised Civil Statutes of Texas, 1925.

The Constitution of Texas, by Art. 16, requires a district judge to take the following oath of office:

"Art. 16, Sec. 1. Members of the Legislature and all officers before they enter upon the duties of their offices shall take the following oath or affrmation: I, ——— do hereby solemnly swear (or affirm), that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ——— according to the best of my skill and ability, *agreeably to the Constitution and laws of the United States and of this State*," etc. (Emphasis ours.)

We do not see what process of reasoning would lead to the conclusion that a district judge of Texas would authorize your petitioner to do anything "in defiance" of the laws of the State of Texas. We do not see how any such unlawful and defiant operation can be ascribed to petitioner without ascribing to the district court of Travis County, Texas, the same unlawfully acts in defiance of the laws of the State of Texas. Such, surely is not the case nor the meaning of this Court in the language which it has used in its decision in this case.

Surely no court would be regarded as authorizing the doing of an act in defiance of the laws of this state, and if so, then the Federal Courts have defied the laws of this State in *Sage v. Baldwin*, 55 Fed. (2d) 968, and in many other cases, including *Galveston Truck Lines v. Railroad Commission of Texas*, 2 Fed. Supp. 488, with the express approval of this Court in 289 U. S. 708, 53 Sup. Ct. 694. We mildly wonder what this Court would say as to the bona fide of the operation of Galveston Truck Lines which has never had a permit or certificate issued by the

Railroad Commission of Texas, but which has operated under an injunction of a Federal Court with the approval of this Court since January 11, 1933.

If the phrase "bona fide" means what this Court has said it does in the case of *Ware v. Hylton*, supra, and as defined by Webster and Bouvier, how is it possible to ascribe fraud, deceit, collusion, or trust to the acts of McDonald in his operation with the express approval of the court under a final and permanent injunction which was just as final and permanent as the trial court could make it, and issued after a final trial on the merits without ascribing some act of fraud or deceit or collusion or trust to the district judge of this state which granted the injunction.

How can this Court so easily conclude that petitioner was operating in defiance of the laws of the State of Texas when Section 17 of the Texas Motor Truck Law, Art. 1690(b), Penal Code of Texas, 1925, Acts 42nd Legislature, 1931, p. 480, Chapt. 277, provides penalties, and Sub-section (c) makes the following provision:

> "(c) Upon the violation of any provision of this Act, or upon the violation of any rule, regulation, order, or decree of the Commission promulgated under the terms of this Act, *any District Court of any county where such violation occurs shall have the power to restrain and enjoin the person, firm or corporation so offending from further violating the provisions of this Act or from further violating any of the rules, regulations, orders and decrees of the Commission.*

> *Such injunctive relief may be granted upon the application of the Commission, the Attorney General or any District or County Attorney.* No bond shall be required when such injunctive relief is sought upon the application of the Commission, Attorney General or any District or County Attorney. Such relief may be granted in suits for penalties as provided in subdivision (b) of this section, but a suit for penalty shall not be a condition precedent to the injunctive relief provided by this subdivision." (Emphasis ours.)

Surely it must be assumed that the Railroad Commission of Texas, the Attorney General of Texas, or some district or county attorney of this state would have performed his duty and have enjoined petitioner if he were operating "in defiance" of its laws. The Attorney General of Texas was present in the trial of petitioner's case in the district court and represented the Railroad Commission of Texas, and he likewise was under a constitutional oath to support and uphold the constitution and laws of this state, and if petitioner's operation was in defiance of the laws of this state, why did he not enjoin McDonald in that proceeding if nowhere else or at no other time? It is easy to say that petitioner was operating in defiance of the laws of this state, but we submit that it is quite difficult to follow that statement up with any logical reasoning which would lead to any such conclusion.

GROUND NO. II

The Supreme Court of Texas followed by the Court of Civil Appeals of Texas having construed the Texas statute and held that operators similarly situated to petitioner were in "bona fide" operation and entitled to continue to operate until the Interstate Commerce Commission should otherwise order in spite of the Texas statute and having refused to hold that such an operator as petitioner was operating in "defiance" of Texas law is necessarily binding upon the Federal Courts.

AUTHORITIES

Burgess v. Seligman et al, 107 U. S. 20, 2 Sup. Ct. 10.

Southwestern Greyhound Lines, Inc., v. Railroad Commission (Sup. Ct.), 99 S. W. (2d) 268.

Railroad Commission v. Bates (Ct. Civil App.), 108 S. W. (2d) 286.

Railroad Commission v. Futch (Civil App.), 108 S. W. (2d) 289.

Railroad Commission v. Peterson (Civil App.), 108 S. W. (2d) 289.

Railroad Commission v. Williams (Civil App.), 108 S. W. (2d) 290.

Thompson et al v. Rayburn, 109 S. W. (2d) 789.

Senn v. Tile Layers Protective Union, 301 U. S. 468, 57 Sup. Ct. 857.

Lee v. Bickell, 292 U. S. 415, 54 Sup. Ct. 727.

Georgia Ry. & Electric Co. v. Decatur, 295 U. S. 165, 55 Sup. Ct. 701.

Coombes v. Getz, 285 U. S. 434, 52 Sup. Ct. 435.

Price v. Illinois, 238 U. S. 446, 35 Sup, Ct. 892.

Sage v. Baldwin, 55 Fed. (2d) 968.

The only possible conclusion to be gained from the Bates case, supra, wherein the courts permanently enjoined the Railroad Commission, is that that court was following *Sage v. Baldwin*, supra, which directly held that the Railroad Commission could not require of an exclusive interstate carrier a certificate. It has always been the law of this state since *Sage v. Baldwin* that no certificate could be required of such an operator. The Railroad Commission even disclaims such power.

ARGUMENT

Still this Court, utterly disregarding all issues involved in this case except the issue of "bona fide operation," if that issue be involved, and which is by no means conceded, has chosen to determine this case upon its own construction of the Texas Motor Carrier Law, Art. 911(b), Revised Civil Statutes, 1925, Acts of 42nd Legislature, p. 480, chapt. 277, and held that petitioner was not within the proviso of section 206, Motor Carrier Act, 1935, because he was operating, as this Court says, "in defiance of its laws." Such a determination therefore permits this case to turn wholly upon this Court's construction of the Texas Motor Truck law.

There is a very definite and settled rule, as shown by the authorities cited hereinabove and for which this Court needs no citation of authority, that Federal Courts, including the Supreme Court of the United States, are bound by the construction placed upon state constitutions and statutes by the highest court of that state; and we think that rule applies here. The Supreme Court of Texas, followed in a number of cases by Courts of Civil Appeals of Texas, has placed no such construction as that upon the Texas Motor Truck law. In other words, the Supreme Court says that the petitioner was operating in defiance of the laws of Texas, yet the Texas Supreme Court and Courts of Civil Appeals of Texas have entertained utterly no such view. The construction placed upon the Texas statutes by the Texas courts, including the Supreme Court of Texas, and Courts of Civil Appeals of Texas, is binding, as we view it, upon this Court.

Among the authorities cited hereinabove will be found the *Southwestern Greyhound Lines* case, a case by the Supreme Court of Texas, subsequently followed by the Court of Civil Appeals in the Bates, Futch, Peterson, Williams, and Rayburn cases. Bates, Futch, Peterson, Williams, and Rayburn appealed to state courts for temporary injunctions to protect their operations pending determination of their applications before the Interstate Commerce Commission, and were in identically the same position that your petitioner here is in. That is, they had complied with every law or requirement of the State of Texas ex-

cept *the supposed requirement* that they must have a so-called state interstate certificate of convenience and necessity. The opinions in each of the cases mentioned will bear out this statement.

Being in identically the same position that your petitioner is in, each of those truck operators secured in the courts of Texas, in spite of the Texas Truck law, and after a construction of the Texas law, a permanent injunction against the Railroad Commission of Texas restraining interference by said Commission. Such construction of Texas law by Texas courts, which necessarily must hold that such operators were not operating in defiance of Texas laws, is binding upon this court, and we think should be followed by this court.

Let us bring again to the attention of this Court the proposition that petitioner could not have been operating in defiance of state laws *because it was established by the record in this case that petitioner had met every requirement of the Texas law except that of obtaining from the Railroad Commission of Texas a so-called state interstate certificate. The Railroad Commission of Texas could not require your petitioner to obtain any such certificate and that fact was early made clear in the administration of the Texas Truck Law* in the case of *Sage v. Baldwin*, 55 Fed. (2d) 968, in which Judge Atwell, writing for a three-judge statutory court, assembled under section 266 of the Judicial Code, said:

> "Preserving, therefore, the rights of the state and the right of the nation, the respondents will

be enjoined from interfering with the operation of the complainants or from arresting them for alleged violations of this law, so far as any rates may be concerned, or so far as any bond securing any shipper may be concerned, *or so far as any certificate of public convenience and necessity may be concerned.*" (Emphasis ours.)

Surely the foregoing opinion is clear and emphatic to the effect that the Railroad Commission of Texas cannot require that an exclusive interstate operator obtain from the Railroad Commission of Texas a certificate of public convenience and necessity. Such has been the law of this state since the *Sage v. Baldwin* case. Every other requirement which the Railroad Commission could possibly make of petitioner had been fully met by petitioner as will be shown by the findings of fact of the trial court in this case.

We trust that this Court will give serious consideration to *Railroad Commission of Texas, et al., v. Bates*, 108 S. W. (2d) 286, in which the court, following the Greyhound Lines case, supra, stated the contention of the appellee Bates, as follows:

"Appellee alleged that he has complied with all these provisions of the act *and is entitled to continue operations without a certificate* until his application has been passed upon by the Interstate Commerce Commission; that he has complied with all the rules and regulations over which the Railroad Commission has jurisdiction, and particularly with respect to the character of vehicles to be used and proper safety lights and equipment, and has furnished all kinds of

insurance required; *but that appellants have arrested him and his drivers, and have threatened to continue to arrest them for any operations unless appellee secures a certificate or permit from the State Commission to operate his trucks on the highways in question;* and that because of such arrests and threatened arrests appellee's business was being irreparably injured; and he prayed for a temporary injunction to be made permanent on final hearing." (Emphasis ours.)

Under such contentions, the Court of Civil Appeals of Texas in following the highest court of our State in disposing of the case said:

"The court also held that in aid of the enforcement of state police regulations, the State Commission might promulgate reasonable rules and regulations for the protection of the highways and their use by the public, and that it might in like manner establish requirements with respect to safety of equipment or standards of equipment, payment of compensation for the use of the highways, qualifications of truck drivers, insurance, and any other matters over which the jurisdiction of the state commission is not in conflict with, nor displaced by, the Federal Act. To that end no doubt the commission may require of each interstate carrier an *application for some sort of certificate or permit to be issued after a certificate of convenience and necessity has been issued by the Interstate Commerce Commission, and to be issued as a matter of right upon proper application after the Interstate Commerce Commission has passed upon and issued its certificate of convenience and necessity.*" (Emphasis ours.)

The Court has here said that the Railroad Commission of Texas under the Texas Truck law could not require an interstate operator to obtain any kind of a certificate or permit under Texas law "until after" the Interstate Commerce Commission had acted upon the application and that if the Interstate Commerce Commission issued a certificate that the Railroad Commission of Texas would be required upon "some sort" of application to issue some character of permit—not a certificate of convenience and necessity but some character of permit—which would in substance amount to no more than a registration, with the Railroad Commission of Texas in order that the Railroad Commission of Texas might enforce such police regulations as were still applicable to interstate operators. Surely this Court is not going to disregard the holding of our state courts with reference to our own State laws and to ascribe to a good law-abiding citizen, such as the petitioner here, law violations when as the record in this case will show the petitioner was able to bring to the hearing and introduce as witnesses his own District Judge, his own Sheriff, Constable, City Marshal, District Attorney, and in fact practically all of the public officials of Ellis County, Texas, his own county. Certainly your petitioner had no intention or any knowledge of violating any law.

Again referring to the Bates case, the court said:

> "Manifestly, if the State Commission cannot be compelled to issue a certificate of convenience and necessity to enable it to enforce its state

police regulations to an interstate carrier already temporarily operating under his pending application to the Interstate Commerce Commission for a permanent certificate, *then the Commission should not and cannot require of such operator a certificate or permit until the Federal right has been made permanent.*" (Emphasis ours.)

We earnestly insist that the construction of a state statute by the highest court in the state should be followed by this Court, and if this rule be given application in this case the original opinion of this Court cannot stand.

GROUND NO. III

The Texas truck law does not now, and has never required, that petitioner have a so-called State Interstate Certificate of Convenience and Necessity, nor any other kind of permit, and any such application makes the Texas statute unconstitutional. Petitioner has not therefore operated in "defiance of any law of this State."

AUTHORITIES

State v. Sugarland Ry. Co., 163 S. W. 1047.
Harris v. Municipal Gas Co., 59 S. W. (2d) 355.
Danciger Oil & Refg. Co. v. Railroad Commission, 49 S. W. (2d) 837.
Buck v. Kuykendall, 267 U. S. 307.
Bush v. Malloy, 267 U. S. 326.

Michigan Public Utilities, etc. v. Duke, 266 U. S. 570.

Smith v. Cahoon, 75 L. Ed. 812.

Sage v. Baldwin, 55 Fed. (2d) 968.

Galveston Truck Lines v. Allen, 289 U. S. 708, 53 Sup. Ct. 694.

Yu Cong Eng v. Trinidad, 271 U. S. 500, 46 Sup. Ct. 619.

Employers Liability cases, 207 U. S. 463, 28 Sup. Ct. 141.

State v. Wittles, 118 Minn. 364, 136 N. W. 883.

Vanderbilt v. Brunton Piano Co., 169 Atl. 177.

Wald Storage & Transfer Co. v. Smith, 4 Fed. Supp. 61, affrmed, 54 Sup. Ct. 129.

Beard v. Smith, 4 Fed. Supp. 61, affirmed, 54 Sup. Ct. 129.

Texas Port Carrier Corporation v. Smith, 8 Fed. Supp. 28.

Trade Mark cases, 100 U. S. 550.

Hunter v. Colfax Consolidated Coal Co., 175 Iowa 245, 154 N. W. 1037.

State v. Jack, 69 Kansas 387, 76 Pac. 911, 1 L. R. A. (NS) 167, affirmed, 199 U. S. 372, 26 Sup. Ct. 73.

Williams v. Standard Oil Co., 278 U. S. 235, 49 Sup. Ct. 115, 60 A. L. R. 596.

ARGUMENT

The holding of this Court is that McDonald was violating Texas law on June 1, 1935, and therefore can not come within the "grandfather proviso." The record shows that McDonald was complying and has complied with all Texas police measures. The only thing he has not done which respondents contend he should have done, was that he did not have a certificate of convenience and necessity under Texas law —a so-called "state interstate certificate." Under the three-judge court decision in the Texas case of *Sage v. Baldwin* handed down long before the Federal Act of 1935 was enacted the court in holding that a purely interstate operator did not have to have a state certificate said:

> "Preserving, therefore, the rights of the state and the right of the nation, the respondents will be enjoined from interfering with the operation of the complainants or from arresting them for alleged violation of this law, so far as any rates may be concerned, or so far as any bond securing any shipper may be concerned, *or so far as any certificate of public convenience and necessity may be concerned.*" (Emphasis ours.)

How can McDonald be stigmatized as a law violator for the reason that he had no state certificate when under Texas law he was not required to have such a certificate? *Sage v. Baldwin* is supported by the Buck, Bush, Michigan Public Utilities, Smith and Galveston Truck Line cases.

Your petitioner feels quite earnestly that he has

violated no law, and considerably hurt that he should so easily be convicted of doing anything in defiance of the laws of the state in which he has lived all of his life, and in which he has never stood charged with any violation in all his life. The Texas Truck Law, Art. 911(b), Revised Civil Statutes, 1925, 42nd Legislature, p. 480, Chapt. 277, Section 2, being the Act under construction in *Sage v. Baldwin* and *Galveston Truck Line*, provides:

> "Sec. 2. No motor carrier, as defined in the preceding section, shall operate any motor propelled vehicle for the purpose of the transportation or carriage of property for compensation or hire over any public highway in the state except in accordance with the provision of this Act; provided, however, that nothing in this Act or any provision thereof shall be construed or held to in any manner affect, limit or deprive cities and towns from exercising any of the powers granted them by Chapt. 147, pages 307 to 318, inclusive, of the General Laws of the State of Texas passed by the 33rd Legislature or any amendments thereto."

The term "Motor Carrier" is defined in Section (g) in the following language:

> "(g) The term 'motor carrier' means any person, firm, corporation, company, co-partnership, association, or joint stock association, and their lessees, receivers or trustees appointed by any court whatsoever, owning, controlling, managing, operating or causing to be operated any motor propelled vehicle used in transporting property for compensation or hire over any pub-

lic highway in this state, where in the course of such transportation a highway between two or more incorporated cities, towns, or villages is traversed; provided that the term 'motor carrier' as used in this Act shall not include, and this Act shall not apply to motor vehicles operated exclusively within the incorporated limits of cities or towns."

There is one requirement and only one requirement which would prevent any person from operating a motor propelled vehicle in the transportation of property for hire in this state, any time and to any place which he might desire, except as found in Section 3 of the Texas Truck Law, and which section provides as follows:

> "Sec. 3. No motor carrier shall, after this Act goes into effect, operate as a common carrier without first having obtained from the Commission, under the provisions of this Act, *a certificate of public convenience and necessity pursuant to a finding to the effect that the public convenience and necessity require such operation.* No motor carrier shall, after this Act goes into effect, operate as a contract carrier without first having obtained from the Commission a permit so to do which permit shall not be issued until the applicant shall have in all things complied with the requirements of this Act." (Emphasis ours.)

The foregoing language of the statute is clear, is unambiguous, requires no construction, and is applicable to all carriers alike, both in interstate and intrastate commerce. The provisions of the statute

are not severable. The entire statute depends upon Section 3 as quoted hereinabove. If Section 3 be unconstitutional, then the entire statute must fall because it is not severable.

By the provisions of Section 3, so far as its own language is concerned, every carrier both in interstate and intrastate commerce is required before operating as a carrier for hire to first obtain a certain, definite, and particular kind of an instrument from the Railroad Commission of Texas, namely, a *certificate*, and this certificate must be of a particular kind, namely, *a certificate of convenience and necessity* and there is the mandatory requirement in the statute, as emphasized and quoted above, that this certificate which is required must be issued by the Railroad Commission of Texas "*pursuant to a finding to the effect that the public convenience and necessity* require such operation."

So far as the language of the Act is concerned, the requirement applies alike to all operators of trucks in intrastate and interstate commerce. But to save its constitutionality it must be construed in its relation to the National Government as relating to that which is within the legislative power of the State.

The Railroad Commission of Texas is a creature of statute having that power and only that power that has been delegated to it by the statutes of this state. *State v. Sugarland Ry. Co.*, 163 S. W. 1047; *Harris v. Municipal Gas Co.*, 59 S. W. (2d) 355; *Danciger Oil & Ref. Co. v. Railroad Commission*, 49 S. W. (2d) 837.

We see therefore that neither the statute nor the Railroad Commission of Texas may require of McDonald, your petitioner herein, any kind of a certificate or permit except that particular kind of a certificate or permit as described in Section 3 of the statute.

That the Railroad Commission of Texas, or that the State of Texas, and it has not attempted to do so, cannot require that particular kind of a certificate in the regulation of interstate commerce is too well settled to require argument. *Buck v. Kuykendall*, 267 U. S. 307; *Bush v. Malloy*, 267 U. S. 325; *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570; *Smith v. Cahoon*, 75 L. Ed. 812; *Sage v. Baldwin*, 55 Fed. (2d) 968; *Galveston Truck Line v. Allen*, 289 U. S. 708, 53 Sup. Ct. 694. It is a foregoing and distinct conclusion, therefore, that the Railroad Commission of Texas could not under the Texas Motor Truck Law require that your peitioner have any kind of certificate or permit, *and if it has so attempted to require under the foregoing authorities, the statute must fall as being unconstitutional and in contravention of the Commerce Clause of the Constitution of the United States.*

Some of the federal courts in Texas have tried to do a lot of legislating and carve out of a statute that which is not within the statute and which the legislature clearly never intended, and this must be the only conclusion in view of the clear, plain, and distinct language which the legislature used.

Where the language used in a statute is plain, the

court cannot read words into it that are not found therein, either expressly or by fair implication, even to save its constitutionality, because this would be legislation by the courts and not construction. *Yu Cong Eng v. Trinidad*, 271 U. S. 500, 46 Sup. Ct. 619; *Employers' Liability cases*, 207 U. S. 463, 28 Sup. Ct. 141; *Trade Mark cases*, 100 U. S. 550.

Hence, if the text of an act is unambiguous, as is the case with the Texas Motor Truck Law, it may not be rewritten by the courts to accomplish the purpose of preserving the law. Employers' Liability cases, supra.

The Federal Courts in Texas, in construing the Texas Truck Law, have attempted to restrict its meaning and make the words used in Section 3 of the Texas Truck Law apply in part to interstate carriers by writing out the plain language of the statute and attempting to write in a legislative intent which cannot be found in the plain language of the statute. A court is not permitted to adopt a restricted construction which would be a mere arbitrary decision of the court, as the courts have attempted to do with our truck law, and which in effect would amount to a re-drafting of the law in order to make it conform to that which in the view of the court should have been originally enacted by the legislative body. *State v. Wittles*, 118 Minn. 364, 136 N. W. 883; *Vanderbilt v. Brunton Piano Co.*, 169 Atlantic 117, and where the legislature of a state, as in our Texas Motor Truck Law, has made no limitation or exception the legal presumption is that it intended to

make none, and it would be judicial legislation for a court to do so.

The federal courts have theretofore in such cases as *Wald Storage & Transfer Co. v. Smith*, 4 Fed. Supp. 61, affirmed at 54 Sup. Ct. 129; *Beard v. Smith*, 4 Fed. Supp. 61, affirmed at 54 Sup. Ct. 129, and *Texas Port Carrier Corporation v. Smith*, 8 Fed. Supp. 28, substantially declared the Texas Motor Carrier Act unconstitutional because the courts in those cases have held that no requirement should be made of an exclusive interstate carrier that he have a certificate of convenience and necessity made "pursuant to a finding to the effect that the public convenience and necessity required such operation" but the courts have by their attempted construction and by invasion of the legislative field, as applied to exculsive interstate carriers, written those words out of the Texas Truck Law, and which, under the authorities cited hereinabove, the courts have utterly no authority to do.

The whole statute ought to fall as being unconstitutional as it is unconstitutional because under the plain language of the Act, which is not ambiguous, which is clear, which requires no interpretation or construction, the Act applies to all carriers alike and is not severable.

However, we do not insist before this Court upon this Court's making any such constitutional determination in this case, although this Court ought to give serious consideration to such matters before finding that petitioner is a law violator. Rather we resort to the rule of favorable construction as it finds its

application in the case of state statutes in their relation to the National Government. Such statutes will be construed to cover only the field appropriate to state action. *Hunter v. Colfax Consolidated Coal Co.*, 175 Iowa 245, 154 N. W. 1037, 15 Anno. cases 1917 E. 903; *State v. Jack*, 69 Kansas 387, 76 Pac. 911, 1 L. R. A. (NS) 167, affirmed in 199 U. S. 372, 26 Sup. Ct. 73, and many other cases.

It is unnecessary to cite authority for the foregoing proposition as well as for the further proposition that where a statute is open to two constructions, one of which will make the same constitutional and the other which would make it unconstitutional that courts will adopt that construction of the statute which will uphold the constitutionality of the statute. That is what the courts ought to do in the case of the Texas Motor Truck law without convicting McDonald of being a law violator. In other words, the courts must hold that the Texas Motor Truck Law is applicable to intrastate commerce and not interstate commerce; otherwise the Texas Motor Truck Law must fall as being unconstitutional, because so far as its plain language is concerned, it applies to the interstate operator the same as it applies to the intrastate operator.

The statute is not severable nor divisible. A consideration of the entire Act shows that the entire Act revolves around section 3, and there is utterly no way that you can read section 3 so as to read in the words "pursuant to a finding to the effect that public convenience and necessity require such operation" as

to intrastate operators and at the will of the courts read those words out of the statute as applied to interstate operators.

We realize, of course, that where a statute is severable and divisible that minor and unimportant parts of the Act which may be unconstitutional may be held to be unconstitutional without affecting the validity of the remaining portions of the Act, and most statutes do contain the so-called saving clauses as the Texas Motor Truck law contains such a clause, but in neither event can the Texas Motor Truck law be saved from unconstitutionality if section 3 of the Act be given effect and be given the interpretation which the Federal Courts have heretofore attempted to give it, but which we have heretofore attempted to show in this argument that the state courts by necessary implication from their construction of the Act do not agree.

The courts have frequently had occasion to decide that unimportant portions of general statutes are not of sufficient importance to render the entire act unconstitutional. That is not the case here, however, because as stated elsewhere herein, the entire Texas Truck Law revolves about section 3 of that Act. It may be stated as an additional test for determining whether the provisions of a statute are severable *that whenever the ruling feature of a law or the essential part from which the remaining portions take their cast, is unconstitutional the act must fall as a whole. Williams v. Standard Oil Company*, 278 U. S. 235, 49 Sup. Ct. 115, 60 A. L. R. 596.

The Texas Motor Truck Law, therefore, simply does not apply to your petitioner. He is not a violator of the law; neither is he operating in defiance of the law. To so hold is to hold that the Texas Motor Truck Law is unconstitutional.

It is not necessary to hold that the Texas Motor Truck law is unconstitutional, but rather that favorable construction should be given to the Act in its relation to the National Government as being intended to cover only the field appropriate to action by the state of Texas, that is, intrastate commerce.

This Honorable Court has simply committed manifest and obvious error in its ruling.

Let's test the applicability of the Texas Truck Law to your petitioner by assuming a criminal prosecution. If a person is guilty of an offense, there must be some place to which such a person can turn to know whether he is violating a law or not. In this state that place is the Penal Code of Texas, it being provided in Art. 3 of the Texas Penal Code as follows:

> "Art. 3. Penalties must be affixed by written law. In order that the system of penal law in force in this State may be complete within itself, and that no system of foreign laws, written or unwritten, may be appealed to, it is declared that no person shall be punished for any act or omission, unless the same is made a penal offense, and a penalty is affixed thereto by the written law of this state."

Keep in mind the requirements of section 3 as heretofore set out, as well as the provisions of Art. 3

of the Penal Code. Keep in mind especially that the only kind of a certificate which the state has so far prescribed as being prerequisite to operating as a common carrier for hire over the highways of Texas is that peculiar kind of a certificate which is called a certificate of convenience and necessity and which must be made "pursuant to a finding to the effect that the public convenience and necessity require such operation."

Suppose that the state had wished to proceed against your petitioner (which, by the way the state has never attempted to do as shown by this record) because your petitioner had not obtained that peculiar kind of an instrument as required by the written law of this state. The complaint would necessarily have to be in substance that on or about a certain date A. E. McDonald did then and there operate over a certain highway (naming it) in this state as a common carrier, motor carrier for hire "without first having obtained from the Railroad Commission of Texas a certificate of public convenience and necessity pursuant to a finding to the effect that public convenience and necessity requires such operation." 1 Code Criminal Procedure, 1925, Art. 396, note 13.

Of course the attorney general, the Railroad Commission of Texas, any law enforcement officer employed by the Railroad Commission of Texas, any county or district attorney in Texas, as well as any sheriff or any constable in the state of Texas, could have filed such a complaint but they never filed one,

and if they had filed such complaint they never could have established under any circumstances that the Railroad Commission of Texas had ever issued to anybody any such certificate, or that they could have issued to anybody any such peculiar certificate because the courts had theretofore told the Railroad Commission of Texas that they could not consider nor make a finding to the effect that public convenience and necessity require such operation, and never since the *Galveston Truck Line* case, 2 Fed. Supp. 288, 289 U. S. 708, has the Railroad Commission of Texas in administering the Texas truck law ever attempted to require any interstate operator to prove convenience and necessity. The complaint must therefore and certainly would fall. If such a complaint could not be sustained in Texas, and surely it could not be sustained under the decisions cited herein, then your petitioner is not a law violator and has not operated in defiance of the laws of this state. With all due respect and a feeling of humility, we are compelled to say that your Honorable Court has simply committed manifest and obvious error in so finding. We further most humbly beseech this Court to correct this error or sustain its conclusion by any logical process.

WHEREFORE, your petitioner respectfully prays that this motion for rehearing be granted and that upon reconsideration of this case that the judgment of the Circuit Court of Appeals be overruled, and that the judgment of the trial court herein be in all things affirmed.

Respectfully submitted,

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